

**BEFORE THE SECRETARY OF STATE
STATE OF COLORADO**

CASE NO. OS 2007-0017

AGENCY DECISION DISMISSING COMPLAINT

**IN THE MATTER OF THE COMPLAINT FILED BY DAVID HUSTVEDT REGARDING
ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY FRIENDS OF
ALICE MADDEN.**

This matter is before the Administrative Law Judge (ALJ) upon the complaint of David Hustvedt (Hustvedt) alleging that Friends of Alice Madden (Friends), a registered candidate committee, violated § 1-45-106, C.R.S. by making a prohibited expenditure of unexpended campaign contributions. On July 17, 2007, Friends filed a motion to dismiss the complaint for lack of subject matter jurisdiction. Hustvedt's response opposing the motion was filed August 6, 2007, and the matter is now ripe for decision. Hearing upon the merits of the complaint was stayed pending the ALJ's ruling.

Background

Friends is a registered candidate committee, and as such is bound by the fair campaign finance laws set forth in Colo. Const. art. XXVIII and the Fair Campaign Practices Act, §§ 1-45-101 to 118, C.R.S. Alleged violations of those laws may be prosecuted as set forth in art. XXVIII, § 9(2)(a) by filing a complaint within the Secretary of State within 180 days of the alleged violation. The Secretary refers such complaints to an administrative law judge for hearing. Section 9(2)(a).

Hustvedt's complaint alleges that Friends violated § 1-45-106, C.R.S. of the Fair Campaign Practices Act (FCPA) by spending \$95 of unexpended campaign contributions to pay attorney registration fees. Section 1-45-106(1)(a)(II) prohibits the use of unexpended campaign contributions for "personal purposes not reasonably related to supporting the election of the candidate." Hustvedt's complaint alleges no other violation of the campaign finance laws other than § 1-45-106.

Friends moves to dismiss the complaint on the grounds that art. XXVIII, § 9(2)(a) does not provide either the Secretary of State or the ALJ with subject matter jurisdiction over an alleged violation of § 1-45-106. Friends points out that while § 9(2)(a) lists many art. XXVIII and FCPA violations that may be prosecuted, § 1-45-106 is not included in the list. Hustvedt responds that both this court and the Colorado Court of Appeals already have established precedent for accepting jurisdiction over such complaints. He further argues that failure to do so in this case would violate § 1-45-111.5, C.R.S., which requires the Secretary of State to "enforce and administer any provision of this article."

The ALJ agrees that art. XXVIII, § 9(2)(a) does not create jurisdiction to decide alleged violations of § 1-45-106, and therefore grants Friend's motion to dismiss the complaint.

Discussion

Standard applicable to this motion

Colo. Const. art. XXVIII, § 9(1)(f) directs that hearings of alleged fair campaign law violations be conducted according to the provisions of the Administrative Procedure Act, § 24-4-105, C.R.S. That section, in turn, adopts the district court civil rules of practice, to the extent practicable. Section 24-4-105(4). Rule 12(b)(1) of the Colorado Rules of Civil Procedure permits a defendant to raise by motion the court's lack of jurisdiction over the subject matter of the case. When lack of jurisdiction is raised, the plaintiff has the burden to prove jurisdiction. *Bazemore v. Colo. State Lottery Div.*, 64 P.3d 876, 878 (Colo. App. 2002); *Padilla v. School Dist. No. 1*, 25 P.3d 1176, 1180 (Colo. 2001). When there is no evidentiary dispute relevant to the motion, the court may rule without a hearing. *Tidwell v. City & County of Denver*, 83 P.3d 75 (Colo. 2003); *Padilla, supra*.

Administrative tribunal's jurisdiction is limited

Administrative agencies are creatures of statute with no jurisdiction greater than that provided by the statutes that create them. *Dee Enterprises v. Indus. Claim Appeals Office*, 89 P.3d 430, 437 (Colo. App. 2003)(ALJ cannot exercise any jurisdiction not granted by statute), *citing Miller v. Denver Post, Inc.*, 137 Colo. 61, 322 P.2d 661 (1958); *Maryland Casualty Co. v. Indus. Comm.*, 116 Colo. 58, 178 P.2d 426 (1947); and *Pub. Utils. Comm'n v. Colo. Motorway, Inc.*, 165 Colo. 1, 437 P.2d 44 (1968). Acts that exceed the scope of an administrative agency's delegated powers are void. *Flavell v. Dept. of Welfare*, 144 Colo. 203, 355 P.2d 941, 943 (1960); *Adams v. Colorado Dept. of Social Services*, 824 P.2d 83, 86 (Colo. App. 1992); *O'Neill v. Dept. of Revenue*, 765 P.2d 590, 591 (Colo. App. 1988).

Art. XXVIII, § 9(2)(a) does not provide jurisdiction over an alleged violation of § 1-45-106, C.R.S.

The pertinent part of § 9(2)(a) reads, "Any person who believes that a violation of section 3, section 4, section 5, section 6, section 7, or section 9(1)(e), of this article, or of sections 1-45-108, 1-45-114, 1-45-115, or 1-45-117 C.R.S., or any successor sections, has occurred may file a written complaint with the secretary of state no later than one hundred eighty days after the date of the alleged violation." Notably, there is no reference to § 1-45-106 in this list of actionable sections. Although one might wonder whether the exclusion from the list of enforceable provisions was an oversight, the ALJ is bound by the plain and unambiguous language of the law. When language of a constitutional amendment is clear and unambiguous, the amendment must be enforced as written. *Davidson v. Sandstrom*, 83 P.3d 648, 654 (Colo. 2004). Although the court's obligation is to give effect to the intent of the electorate, in giving effect to

that intent the court must look to the words used, reading them in context and according them their plain and ordinary meaning. *Sanger v. Dennis*, 148 P.3d 404, 412 (Colo. App. 2006).

The FCPA provides no independent mechanism for enforcement beyond that specified in § 9(2)(a) of art. XXVIII. Section 1-45-113, which previously provided its own sanctions for violation of the FCPA, was repealed in 2002 when art. XXVIII became effective. Art. XXVIII, § 12.

As Hustvedt points out, § 1-45-111.5 of the FCPA does impose upon the Secretary of State the duty to “promulgate such rules ... as may be necessary to enforce and administer any provision of this article.” However, the FCPA does not specify what that enforcement mechanism should be, and the Secretary of State’s rules provide no enforcement mechanism other than that specified in art. XXVIII, § 9(2)(a). See 8 CCR 1505-6, § 6. Although the Secretary of State arguably could establish by regulation a separate mechanism to enforce the provisions not covered by art. XXVIII, § 9(2)(a), the Secretary has not done so. Thus, at present, no law creates a mechanism to hear and adjudicate alleged violations of § 1-45-106. In the absence of such law, the ALJ has no jurisdiction to hear this complaint.

Hustvedt points to the case of *Williams v. Teck*, 113 P.3d 1255 (Colo. App. 2005) and its underlying administrative decision as precedent for the proposition that the Secretary of State and the ALJ have jurisdiction over violations of § 1-45-106. Indeed, in *Teck*, one of the several alleged violations was of § 1-45-106. Without specifically addressing the issue of jurisdiction, the ALJ in *Teck* considered the merits of the case but found no violation. The court of appeals, again without addressing the issue of jurisdiction, affirmed the ALJ’s decision. Unlike the present case, the respondent in *Teck* made no motion to dismiss the §1-45-106 allegation for lack of jurisdiction, and the issue was not otherwise raised or decided by the administrative or appellate courts.

The ALJ does not consider *Teck* to be precedent. The mere fact that a jurisdictional issues lies hidden in a case does not create precedent unless the issue is raised and decided. *Kvos, Inc. v. Associated Press*, 299 U.S. 269, 279 (1936)(“Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents,” quoting *Webster v. Fall*, 266 U.S. 507 (1925)). Nor can it be assumed that the prior court thought it had jurisdiction or it would not have decided the case on the merits. *Kvos*, 299 U.S. at 279 (“The most that can be said is that the point was in the case if anyone had seen fit to raise it.”)¹

Summary

Because Colo. Const. art. XXVIII, § 9(2)(a) provides no jurisdiction to consider an alleged violation of § 1-45-106, C.R.S., the complaint must be dismissed.

¹ See *In the Matter of the Complaint Filed by Rob Fairbank Regarding Alleged Campaign and Political Finance Violations by Pete Mazula and Randall Atkinson*, Case No. OS 20040022, Nov. 30, 2004, for an example of a case dismissed for lack of § 9(2)(a) jurisdiction when the issue was specifically raised.

Agency Decision

The complaint against Friends of Alice Madden is dismissed. Because this ruling disposes of all issues raised by the complaint, the decision is subject to review by the Colorado Court of Appeals, pursuant to § 24-4-106(11), C.R.S. and Colo. Const. art. XXVIII, § 9(2)(a).

Done and Signed:

August 8, 2007

ROBERT N. SPENCER
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above **AGENCY DECISION DISMISSING COMPLAINT** was placed in the U.S. Mail, postage prepaid, at Denver, Colorado to:

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on this ____ day of February, 2008.

Court Clerk